(10)

No. 98-564

FILED
NOV 4 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

MATTHEW J. GLAVIN, ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF MATTHEW J. GLAVIN, ET AL.

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL FOUNDATION
3100 Broadway, Suite 515
Kansas City, Missouri 64113
913-931-5559

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

24 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

THE COMMERCE DEPARTMENT'S STATISTICAL SAMPLING PLAN FOR THE 2000 DECENNIAL CENSUS VIOLATES THE CENSUS ACT 2

A. The Statute Clearly Expresses Congress' Intent That Sampling Not Be Used For The Apportionment Census 2

1. Clear Statutory Language Cannot Properly Be Ignored 3

2. The Census Act Must Be Read In Its Totality 5

3. Section 195's Specific Sampling Prohibition Takes Precedence Over Section 141's General Provisions 7

B. The Legislative History Expresses Congress' Intent That Sampling May Not Be Used For The Apportionment In The House Of Representatives 9

1. Section 195 Of The 1957 Census Act Indicates Congress' Intent That Sampling Should Not Be Used In Determining Population For The Purposes Of Apportionment In The House Of Representatives 9

2. The 1976 Revision Again Reflects Congressional Intent To Exclude The Use Of Sampling In Connection With Apportionment... 11

C. Legislative History Of Section 141 Does Not Support A Contention That Section 141 Authorizes The Use Of Statistical Sampling For Congressional Apportionment 12

TABLE OF CONTENTS – Continued

Page

D. In 1980 Congress Rejected Legislation That Would Have Required The Census Bureau To Utilize Statistical Sampling 13

E. Appellants' Proposed "Compromise" Reading Of Sections 141 and 195 Is Contrary To The Law.. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES:

Aeron Marine Shipping Co. v. United States, 695 F.2d 567 (D.C. Cir. 1982) 8

Ashwander v. TVA, 297 U.S. 288 (1936)..... 1

Bennett v. Spear, 117 S. Ct. 1154 (1997) 4

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 14

Brown v. Gardner, 513 U.S. 115 (1994)..... 4

Chevron, USA v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 9

City of New York v. U.S. Dep't of Commerce, 34 F.3d 1114 (2d Cir. 1994) 15

City of Philadelphia v. Klutznick, 503 F.Supp. 663 (E.D. Pa. 1980) 12

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 8

Crosby v. United States, 506 U.S. 255 (1993) 3, 4

Demarest v. Manspeaker, 498 U.S. 184 (1991)..... 8

Dale v. United Steelworkers of America, 494 U.S. 26, 110 S. Ct. 929 (1990)..... 7

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 8

Gade v. National Solid Waste Mgmt. Ass'n, 505 U.S. 88 (1992) 4

HCSC Laundry v. United States, 450 U.S. 1 (1981) 7

Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961)..... 4

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)..... 5

TABLE OF AUTHORITIES – Continued

Page

Massachusetts v. Morash, 490 U.S. 107 (1989) 7

Morales v. Trans World Airways, Inc., 504 U.S. 374 (1992) 7

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 14

Richards v. United States, 369 U.S. 1 (1962) 5

Richardson v. Ramirez, 418 U.S. 24 (1974) 3

Robinson v. Shell Oil Co., ___ U.S. ___, 117 U.S. 843 (1997) 8

Rubin v. United States, 449 U.S. 424 (1981) 8

United States v. Menasche, 348 U.S. 528 (1955) 4

United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 4, 6

United States v. Riverside, 474 U.S. 121 (1985) 14

Watt v. Alaska, 451 U.S. 259 (1981) 5

Young v. Klutznick, 497 F.Supp. 1318 (E.D. Mich. 1980) *rev'd*, 652 F.2d 617 (6th Cir. 1981) 15

STATUTES:

U.S. Const. Art. I, sec. 2 ..... 1, 11

U.S. Const. Art. II 4

U.S. Const. Amend. XIV, sec. 2 3

13 U.S.C. § 1, *et seq.* 1

13 U.S.C. § 141 ..... *passim*

13 U.S.C. § 141(e)(2) 7, 13

TABLE OF AUTHORITIES – Continued

Page

13 U.S.C. § 193 6

13 U.S.C. § 195 ..... *passim*

13 U.S.C. § 25(c) (1958) 9

MISCELLANEOUS:

Sutherland Stat. Constr. § 51.02 at 453 5

Amendment of Title 13, United States Code, Relating to Census, Hearings of H.R. 7911 Before the House Comm. of Post office and Civil Service, 85 Cong., 1st Sess. 7-8 (June 19, 1957) Conference Report on H.R. 11337, 94 Cong.Rec. 33132 (Sept. 28, 1976) 10

Sheldon T. Bradshaw, Note, *Death, Taxes and Census Litigation: Do Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?* 64 Geo. Wash. L.Rev. 379 (1996) 14

Conference Report, H.R. 11337, mid-decade Census; 94 Cong. Rec. H35171-35174 (daily ed. Oct. 1, 1976) 12, 13

The Decennial Census: An Analysis and Review, Report to the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs, 81-88 (Comm. Print) 14

S3063, 96th Cong., 2nd Sess. (1980), 96 Cong. Rec. at S22856 (daily ed. Aug. 25, 1980) 13

S. Rep. 94-1256, at 6, reprinted in 1976 U.S.C.C.A.N 12

INTEREST OF AMICUS CURIAE[1]

Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the Constitution and individual rights. Landmark was established in 1976 and has offices in Kansas City, Missouri and Herndon, Virginia. The case before the Court presents an important separation of powers and statutory construction issue, *i.e.*, whether the executive branch may ignore clear statutory language and legislative history in conducting a decennial census for Congressional apportionment as required by Article I, Sec. 2 of the Constitution and the Census Act, 13 U.S.C. § 1, *et seq.*

ARGUMENT

This is a statutory construction case. There is no Constitutional question requiring the Court's attention in this case as it can easily, and more properly, be dispensed of on statutory grounds. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the

---

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae* and their counsel, made a contribution to the preparation and submission of this brief.

latter.") Congress has spoken precisely to the suitability of statistical sampling by the Commerce Department's Census Bureau and, in plain language, prohibited the use of this methodology to derive the population used for purposes of Congressional apportionment. The Bureau's decision to use statistical sampling to create the 2000 census population for Congressional apportionment purposes in addition to all other purposes is not authorized – indeed, it is flatly prohibited – by the governing statute. The District Court's decision should be affirmed.

THE COMMERCE DEPARTMENT'S STATISTICAL SAMPLING PLAN FOR THE 2000 DECENNIAL CENSUS VIOLATES THE CENSUS ACT.

A. The Statute Clearly Expresses Congress' Intent That Sampling Not Be Used For The Apportionment Census.

In 1957, Congress amended the Census Act to make *limited* allowances for the use of a new method of counting the nation's citizens. *"Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States,* the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195. (Emphasis added). The prohibition against sampling for reapportionment is crystal clear.

1. Clear Statutory Language Cannot Properly Be Ignored.

Before granting the Secretary discretion to "authorize the use" of sampling, the statute makes clear that the method may not be used "for the determination of population for purposes of apportionment of Representatives of Congress among the several States." 13 U.S.C. § 195. The "except for" language forbids sampling methodology in collecting numbers for apportionment. The restriction is inseparable from the grant of authority to use sampling in other ways. *See Crosby v. United States,* 506 U.S. 255 (1993).

The instant case is not the first in which the Court has addressed the weight of "except for" language. Section 2 of the Fourteenth Amendment reduces from a State's population count in certain circumstances the number of "male inhabitants" whose right to vote is "abridged" for any reason, *"except for* participation in rebellion, or other crime." U.S. Const. Amend. XIV, sec. 2. In *Richardson v. Ramirez,* 418 U.S. 24, 41 (1974) the Supreme Court confirmed that the "except for" language of Sec. 2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony." In the same way, the "except for" language of § 195 expressly exempts from the general authorization of that section any use of sampling for purposes of Congressional apportionment. Similarly, in *Crosby* the Court interpreted a statute requiring the presence of criminal defendants "except as otherwise provided" as constituting an express limitation on the circumstances where a criminal defendant could permissibly be absent. In light

of the statute's "express use of the limiting phrase . . . the language and structure of the rule could not be more clear." 506 U.S. at 259.

In short, Appellants' view that statistical sampling is authorized for the determination of population for purposes of apportionment directly conflicts with the plain language of the statutory text and renders the "except for" limitation entirely meaningless. *See Brown v. Gardner,* 513 U.S. 115, 121 (1994). The Constitution does *not* vest this sort of power in the Executive Branch. U.S. Const. Art. II.

The Bureau's effort to render meaningless the "except for" provision represents a fundamental intrusion by the Executive Branch on Legislative Branch authority. The invasion is particularly offensive here, because the statutory provisions that the Bureau claims are in conflict are, in truth, entirely consistent. *Bennett v. Spear,* 117 S. Ct. 1154, 1166 (1997) ("It is the cardinal principle of statutory construction . . . that it is our duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section"); *Gade v. National Solid Waste Mgmt. Ass'n,* 505 U.S. 88, 100 (1992); *United States v. Nordic Village, Inc.,* 503 U.S. 30, 36 (1992) (rejecting statutory interpretation that "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307-08 (1961) ("In these circumstances we will not adopt a strained reading which renders on part [of a statute] a mere redundancy"); *United States v. Menasche,* 348 U.S. 528, 538-39 (1955) (rejecting proposed ruling that "would,

of course, render altogether meaningless a congressional enactment").

2. The Census Act Must Be Read In Its Totality

Appellants assert that 13 U.S.C. § 141 permits the use of sampling in census taking for Congressional apportionment purposes because it lacks an express prohibition against the method. This selective reading of the Census Act is disingenuous and misplaced.

The explicit prohibition is found in § 195, which is the specific provision governing the permissible uses of the sampling method. Of course, these two provisions of the same Act must be read together. *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look at the language and design of the statute as a whole"); *Watt v. Alaska,* 451 U.S. 259, 267 (1981) ("we decline to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. . . . We must read the statutes to give effect to each if we can do so while preserving their sense and purpose"); *Richards v. United States,* 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act"); *Sutherland Stat. Constr.* § 51.02 at 453 ("Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible"). One would have to be a legal contortionist to read the general authorization for sampling in § 141 as somehow negating the prohibition of sampling for Congressional apportionment in § 195. Again, such a reading would render the specific language

of § 195 meaningless. The Constitutionally appropriate approach – and the common sense approach – is to read the statute so as to give meaning to both provisions.

The only reasonable interpretation of the Act recognizes that § 141 (like the second part of § 195) authorizes the use of sampling for purposes other than Congressional apportionment, while the "except for" provision in § 195 prohibits this methodology for the Constitutionally-prescribed purpose of determining the population for Congressional apportionment. Any other construction of the interplay between § 141 and § 195 would render the "except for" limitation meaningless. *See e.g., Nordic Village, Inc., ibid.*

Sampling in lieu of a head count in the census not only conflicts with the plain prohibition of sampling in § 195, it does not comport with the statuary scheme as a whole. Section 141 governs sampling for popuiation *information*, not apportionment.[2] Section 141 was intended to vest the Secretary with authority to obtain statistics

[2] This interpretation is supported by the fact that § 141 repeats the language of § 193, which permits the Secretary to "make surveys and collect preliminary and supplementary statistics related to the *main topic* of the census as are necessary . . . ." 13 U.S.C. § 193. Since the "main topic" of the decennial census is the enumeration for purposes of apportionment, § 193 authorizes the Secretary to collect supplementary statistical information, ancillary to performing the headcount. Moreover, § 141 is found in Subchapter II of the Census Act, which specifically deals with censuses for purposes other than apportionment.

supplemental to the head count to derive "population *information*" and other census information, such as housing, unemployment, and population characteristics necessary for allocation of federal funding and other purposes other than apportionment.[3] *See Dole v. United Steelworkers of America*, 494 U.S. 26, 36, 110 S. Ct. 929 (1990) (words grouped in a list must be given related meaning); *accord Massachusetts v. Morash*, 490 U.S. 107, 114-115 (1989).

3. Section 195's Specific Sampling Prohibition Takes Precedence Over Section 141's General Provisions.

Established statutory analysis principles require that to the extent that §§ 141 and 195 can not be reconciled (which they clearly can), the "except for" language in § 195 prevails. As between two statutory provisions concerning the same topic, the more specific section governs the general. *Morales v. Trans World Airways, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"); *HCSC Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam)

[3] The legislative scheme prohibiting sampling for apportionment is also supported by § 141(e)(2), which provides that "information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several states, nor shall such information be used in prescribing Congressional districts." Since sampling is permitted in conducting the mid-decade census, this additional prohibition against the use of data obtained in the mid-decade census confirms the statutory scheme that the Secretary may not use sampling for purposes of apportionment.

("it is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned"); *Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982). Accordingly, § 195's *specific* provision governing "sampling" trumps § 141's general grant of authority to the Secretary.

In sum, the only rational and consistent interpretation of the plain language and structure of the Act is that § 195 prohibits sampling for apportionment and § 141 allows it for all other purposes. Particularly when viewed in the context of the statute as a whole, § 141 in no way disturbs the clear and definite prohibition of sampling for purposes of apportionment contained in § 195. As Congress has prohibited sampling for purposes of apportionment, the Bureau has no authority to conduct the decennial census as anything but an actual head-count of the population.

This conclusive reading of the statute's text on its face should end the Court's task. "When the words of a statute are unambiguous, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (*quoting Rubin v. United States*, 449 U.S. 424, 430 (1981); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." (*citing Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)); *see Robinson v. Shell Oil Co.*, ___ U.S. ___, 117 U.S. 843 (1997) ("our inquiry must cease if

the statutory language is unambiguous and the statutory scheme is coherent and consistent").

B. The Legislative History Expresses Congress' Intent That Sampling May Not Be Used For The Apportionment In The House Of Representatives.

1. Section 195 Of The 1957 Census Act Indicates Congress' Intent That Sampling Should Not Be Used In Determining Population For The Purposes Of Apportionment In The House Of Representatives.

An examination of the legislative history of the Act and subsequent Congressional activity provides additional evidence that sampling may not lawfully be used in determining the population for purposes of Congressional apportionment. *See Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The express prohibition of sampling for apportionment in § 195 of the Census Act, as drafted in 1957 and revised in 1976, demonstrates that Congress intended that the census utilize "actual enumeration" rather than sampling for purposes of Congressional apportionment.

Prior to 1957, the Census Act made no provision for the permissibility of sampling methodology in census taking. In fact, the Act required enumerators to make personal inquiry in every dwelling house and of every family to "obtain every item of information and all particulars required for any census or survey." 13 U.S.C. § 25(c) (1958).

In 1957, prior to § 195's enactment, the Commerce Department sought authority to use sampling in the context of the overall census enumeration to achieve economies of operation. The Commerce Secretary believed that "*some* of the information which is described in connection with a census could be secured efficiently through a sample which is conducted concurrently with the complete enumeration of other items." *See Amendment of Title 13, United States Code, Relating to Census, Hearings of H.R. 7911 Before the House Comm. of Post office and Civil Service*, 85 Cong., 1st Sess. 7-8 (June 19, 1957) (emphasis added). Moreover, the Secretary specifically sought permission to use statistical sampling because he lacked authority to use the method, as it had "generally been held that the term 'census' implied a complete enumeration." *Ibid.*

In 1957 Congress granted the Secretary authority to utilize sampling methods purposes *other than apportionment*. This limited grant of authority confirms Congressional intent that the decennial census must be conducted as an actual enumeration. Statistical sampling could not be used for apportionment purposes. As originally enacted, § 195 stated:

> Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.

The House Report reflects this exception:

> Section 195 provides that the Secretary of Commerce may authorize the use of the statistical method known as sampling in carrying out the purpose of Title 13, if he deems it appropriate. However, section 195 does not authorize the use of sampling procedures in connection with apportionment of representatives.
>
> The purpose of section 195 in authorizing the use of sampling procedures is to permit the utilization of something less than a complete enumeration, as implied by the word "census," when efficient and accurate coverage may be affected through a sample survey. Accordingly, except with respect to apportionment, the Secretary of Commerce may use sampling procedures when he deems it advantageous to do so.

Thus, there is ample evidence that Congress intended § 195, as originally enacted, to prohibit the use of statistical sampling in apportionment of Representatives.

2. The 1976 Revision Again Reflects Congressional Intent To Exclude The Use Of Sampling In Connection With Apportionment.

Congress revised the Census Act in 1976. Congress again confirmed that the decennial census for apportionment purposes must be based on an actual head count, in accord with the constitutional mandate for an "actual Enumeration." U.S. Const. Art. I, sec. 2. Furthermore, Congress maintained the prohibition against sampling as a method "for the determination of population for purposes of apportionment of Representatives in Congress." It did, however, allow the Secretary to use sampling "where feasible" instead of "where appropriate."

The Conference Report of the revisions again confirmed that the revised § 195 authorized the Secretary to

use sampling procedures "if feasible, *except in the apportionment of the U.S. House of Representatives.*" Conference Report on H.R. 11337, 94 Cong.Rec. 33132 (Sept. 28, 1976) (emphasis added). The Senate Report also clearly indicated Congressional intent to exclude sampling methods in determining apportionment in the House. S.Rep. 94-1256, at 6, reprinted in 1976 U.S.C.C.A.N.[4]

C. Legislative History Of Section 141 Does Not Support A Contention That Section 141 Authorizes The Use Of Statistical Sampling For Congressional Apportionment.

The legislative history of § 141, which was added to the Census Act in the 1976 revision, provides no indication that Congress intended the provision to authorize the Secretary to utilize statistical sampling for Congressional apportionment. There is simply no basis upon which to read § 141 in the manner Appellants propose.

The principal purpose of the 1976 revisions was merely to authorize a mid-decennial census to "maximize

---

[4] One district court has erroneously suggested that the revision of § 195 to say that the Secretary "shall" use sampling when feasible, rather that "may" use such sampling authorizes the Secretary to use sampling for Congressional apportionment. *City of Philadelphia v. Klutznick*, 503 F.Supp. 663, 679 (E.D. Pa. 1980). Amending the second clause of § 195 from permissive language to mandatory language in no way affects the fact that first part of § 195 contains an explicit exception for Congressional apportionment. The fact that Congress sought to encourage sampling "except for" Congressional apportionment does not suggest that it was authorizing (or requiring) sampling for Congressional apportionment.

equality and distribution of Federal [funding allocation] formulas." Conference Report, H.R. 11337, mid-decade Census; 94 Cong. Rec. H35171-35174 (daily ed. Oct. 1, 1976) (statement of R. Schroeder). Indeed, § 141(e)(2) prohibits the use of information gathered in the mid-decennial census, which may be conducted by sampling, for apportionment or redistricting. Title 13, § 141(e)(2), of the United States Code provides that information "obtained in any mid-decade census shall not be used for apportionment of representative in Congress among the several states, nor shall such information be used in prescribing congressional districts." 13 U.S.C. § 141(e)(2). Section 141 clearly is designed to facilitate administrative functions rather than displace § 195's prohibition against sampling for Congressional apportionment.

D. In 1980 Congress Rejected Legislation That Would Have Required The Census Bureau To Utilize Statistical Sampling.

In 1980 Congress again rejected legislation that would "require the bureau of the Census to adjust the population figures, employing the best available methodology to correct for undercounting for all purposes, including reapportionment." S3063, 96th Cong., 2nd Sess. (1980), 96 Cong. Rec. at S22856 (daily ed. Aug. 25, 1980).

The 1980 legislation seeking to grant sampling authority certainly would not have been proposed had the Commerce Department been thought already to have such authority. In fact, the Congressional Research Service in 1980, after an extensive analysis of the text and

legislative history of those amendments, specifically concluded that the Department *did not* have such authority. *See The Decennial Census: An Analysis and Review, Report to the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs*, 81-88 (Comm. Print).

Accordingly, Congress' refusal to pass such legislation demonstrates that it did not want to grant the Department authority to use sampling for the apportionment count.[5] *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983) ("While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected.") *See United States v. Riverside*, 474 U.S. 121, 137 (1985) ("a refusal by Congress to overrule [a particular] construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) ("Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in an interpretation of the law").

---

[5] Sheldon T. Bradshaw, Note, *Death, Taxes and Census Litigation: Do Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?* 64 Geo. Wash. L.Rev. 379, 407 (1996) ("The Text of § 195 and its legislative history are clear – sampling is not allowed for the purpose of apportioning the House of Representatives").

E. Appellants' Proposed "Compromise" Reading Of Sections 141 and 195 Is Contrary To The Law.

Appellants suggest that § 141's delegation to the Secretary of unfettered discretion to use "statistical sampling" and other methods of determining population "in such form and content as he may determine" clearly does not grant the Secretary such authority with respect to Congressional apportionment. Rather, §§ 141 and 195 "taken together" allow sampling only "as long as it is not a substitute for traditional methods of enumeration." *See City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114, 1125 (2d Cir. 1994), *Young v. Klutznick*, 497 F.Supp. 1318 (E.D. Mich. 1980) *rev'd*, 652 F.2d 617, 625 (6th Cir. 1981).

This proposed "compromise" interpretation of § 141 of the Census Act, limiting the Secretary's discretion to use sampling only in addition to a traditional enumeration, is at odds with the statutory language. In fact, if Appellants' interpretation is adopted, this "compromise" eviscerates § 195's prohibition. The Census Act either authorizes sampling for purposes of Congressional apportionment or it does not. There is no language in the statute that suggests that the Secretary may or shall conduct sampling, but only if it is preceded by, or in conjunction with, a traditional enumeration. There is certainly no requirement that the Secretary's sampling for purposes other than Congressional apportionment must be in addition to an actual "head count". There is no construction of § 141, or the interplay between §§ 141 and 195, that authorizes sampling for Congressional apportionment

only in certain limited circumstances, but simultaneously grants the Secretary unfettered authority to use sampling for other purposes.

Moreover, the "limitation" the Appellants seek to impose on the statute's language is, upon examination, no limitation at all. Appellants contend that apportionment sampling may not be used as a "substitute for traditional methods of enumeration." But the Secretary's plan means that he may use sampling only to add to the population figure derived from the traditional head count for the 2000 census for individuals he cannot find to count. This is precisely the conduct § 195 prohibits.

Under this method, Appellants will not only use sampling to estimate the additional "missing" population that the Department is unaware of, but also to estimate the population of households the Department is aware of, for the final 10 percent of the population not responding to the Census questionnaire. Thus, the Department has chosen to use a statistical sample to estimate the 10 percent of those people not responding to their questionnaires "in lieu of" a head count of those individuals.

It is apparent then, that even if the Department is authorized to supplement population totals derived throughout the traditional method of enumeration, the Department's plan still violates the statute because the final 10 percent is derived through a statistical sampling. This sampling method is utilized as a "substitute for" the traditional method of a head count. While the Department here has chosen to enumerate a 90 percent subset of the known population, it may, under its interpretation for

the statute, just as permissibly enumerate 80 percent, or 50 percent, or 30 percent of the population, and statistically estimate the remainder. In any of these circumstances, Appellants are not using sampling as a complete "substitute for traditional methods of enumeration," but as a supplement to traditional methodology, *i.e.*, head counting. Thus, in reality, Appellants' claim that statutory authority permits sampling in addition to a traditional enumeration is no different than claiming statutory authority exists permitting sampling as the *sole* basis for determining the population for Congressional apportionment purposes. Accordingly, it also is no less prohibited by § 195.

CONCLUSION

The plain language and legislative history of §§ 195 and 141 of the Census Act do not, in any fashion, authorize the use of statistical sampling to any degree in Congressional apportionment. Section 195's clear language specifically prohibits the use of sampling for apportionment. Moreover, its legislative history is replete with examples of Congress' specific intent to exclude the use of sampling for apportionment purposes. Similarly, § 141 and its legislative history fail to indicate any intent on the part of Congress to grant the Department the authority to ignore the specific language of § 195. Finally, any "compromise" reading of § 195 and § 141 proposed by Appellants runs contrary to the express intent of Congress with regards to the authorization of statistical sampling. The

District Court's decision below is correctly decided and should be affirmed.

Respectfully submitted,

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL FOUNDATION
3100 Broadway, Suite 515
Kansas City, Missouri 64111
(816) 931-5559

Counsel for amicus curiae

November 1998